
**In The
Supreme Court of the United States**

UNITED STATES OF AMERICA,

Petitioner,

v.

**NEBRASKA DEPARTMENT OF HEALTH AND HUMAN
SERVICES FINANCE AND SUPPORT, ET AL.**

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**SUPPLEMENTAL BRIEF FOR THE
PRIVATE RESPONDENTS IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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SUPPLEMENTAL BRIEF FOR THE PRIVATE RESPONDENTS IN SUPPORT OF THE PETITION

In our brief for the Private Respondents in Support of the Petition, we argued that the Eighth Circuit's decision was in direct conflict with *Tennessee v. Lane*, 541 U.S. 509 (2004). We urged that the Court hold the petition in this case pending resolution of *United States v. Georgia*, 126 S. Ct. 877 (2006), and then dispose of it as appropriate in light of the *Georgia* decision. On January 10, 2006, this Court issued a unanimous opinion reversing the Eleventh Circuit in the *Georgia* case. That decision underscores the error in the Eighth Circuit's ruling here. Accordingly, in light of *Georgia*, this Court should grant the writ of certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in which that court will consider whether Title II of the Americans with Disabilities Act (Title II) is valid Section 5 legislation as applied to the plaintiffs' claims.

ARGUMENT

Five years before this Court decided *Lane*, the Eighth Circuit ruled, in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), cert. dismissed, 529 U.S. 1001 (2000), that Title II was not valid Section 5 legislation in any of its applications. The *Alsbrook* court explicitly said that "the scope of [its] Section 5 inquiry" looked to "Title II of the ADA" as a whole. *Id.* at 1006 n.11. And that broad focus was central to the *Alsbrook* decision. Ruling the statute invalid under Section 5, the court relied heavily on the wide array of possible applications of the statute to state government: "Title II targets *every* state law, policy, or program." *Id.* at 1009 (emphasis in original).

As we showed in our earlier brief, *Lane* fatally undermined both the bottom-line holding and the key analysis in *Alsbrook*. Contrary to *Alsbrook*'s holding that Title II was invalid Section 5 legislation in all of its applications, *Lane* held that Title II was valid Section 5 legislation in the case before it. See *Lane*, 541 U.S. at 531. And contrary to *Alsbrook*'s conclusion that the Section 5 analysis should focus on Title II as a whole, *Lane* refused "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 530. Instead, the Court made clear that the proper question is whether Congress had Section 5 authority to apply Title II to the "class of cases" like the one before the Court. *Id.* at 530-531.

In its decision here, the Eighth Circuit gave *Lane* an unduly grudging construction. Although *Lane* directly conflicts with both the holding and the reasoning of *Alsbrook*, the court held that *Alsbrook*'s across-the-board invalidation of Title II continues to control in all cases outside of the "discrete" context of "claims of denial of access to the courts." Pet. App. 6a. Accordingly, the court simply refused to consider whether, as applied to this case and the class of cases like it, Title II might be valid Section 5 legislation. See *id.* at 5a-6a.

After this Court's decision in *Georgia*, the Eighth Circuit's judgment can no longer stand. *Georgia* makes clear that *Lane*'s as-applied focus on the "class of cases" like those before the court is not a special procedure limited to access-to-courts cases. After all, *Georgia* upheld Title II as valid Section 5 legislation in a class of cases *outside* the access-to-courts context (Title II prison cases alleging "conduct that *actually* violates the Fourteenth Amendment," *Georgia*, 126 S. Ct. at 882 (emphasis in original)). More important, *Georgia* specifically instructed

the lower courts to evaluate the constitutionality of Title II “on a claim-by-claim basis,” *id.* at 882 – *i.e.*, according to the as-applied approach of *Lane*, rather than the facial approach of *Alsbrook*.

Moreover, the Eighth Circuit’s decision here relied heavily on two pre-*Georgia* court of appeals decisions that held Title II to be invalid Section 5 legislation in the prison context. See Pet. App. 6a (citing *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2005)). One of those decisions, *Miller*, *supra*, was the basis for the Eleventh Circuit judgment this Court reviewed in *Georgia*. See *Georgia*, 126 S. Ct. at 880. This Court’s reversal in *Georgia* established, at the least, that *Miller* was wrong and that the ADA is valid Section 5 legislation in at least some prison cases. *Georgia* thus undermined some of the key authority on which the Eighth Circuit relied here.

In its Brief in Opposition (at 1-4), the state argues that Title II is not valid Section 5 legislation as applied to this case, because the plaintiffs’ claims implicate no fundamental rights or actual constitutional violations. That is incorrect. This case, and the “class of cases” like it, implicates the fundamental right to avoid unjustified commitment and to be free from harmful conditions of commitment. See *Jackson v. Indiana*, 406 U.S. 715 (1972); *Youngberg v. Romeo*, 457 U.S. 307 (1982); see also *Lane*, 541 U.S. at 524-525 (recognizing that Title II enforces these fundamental rights).

But the state’s as-applied argument fails at a more basic level. The Eighth Circuit pretermitted any inquiry into whether Title II is valid Section 5 legislation as applied to this case, because it ruled that an as-applied

inquiry is appropriate only in access-to-courts cases. That was a misreading of *Lane*, as *Georgia* makes entirely clear. This Court should vacate the Eighth Circuit's judgment and remand so that the court of appeals can conduct the as-applied inquiry that *Lane* and *Georgia* mandate: Is Title II, as applied to this case or the "class of cases" like it, valid Section 5 legislation?

◆

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for that court to conduct the as-applied inquiry required by this Court's decisions in *Lane* and *Georgia*.

Respectfully submitted,

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